Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States

DOUGLAS ASPHALT COMPANY,
JOEL SPIVEY, and KYLE SPIVEY,
v.
Petitioners,

ARCH INSURANCE COMPANY,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the District Court erred when it concluded that Arch Insurance Company, as the surety on various highway projects to be performed by Petitioner Douglas Asphalt Company, had not acted in bad faith or abused its discretion when it completed the projects and, consequently, whether Petitioners are obligated to indemnify Respondent for its losses.

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption. Arch Insurance Company is a bond company. Douglas Asphalt Company is a construction and paving company. Joel and Kyle Spivey own and operate Douglas Asphalt Company.

CORPORATE DISCLOSURE STATEMENT

Petitioner Douglas Asphalt Company is a nongovernmental corporation registered in the state of Georgia. There is no parent or publicly held company owning ten percent of more of the stock in Douglas Asphalt Company.

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OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals (Appendix A) is reported at 2010 U.S. App. LEXIS 961 (11th Cir. Feb. 17, 2010). The decision of the District Court (Appendix B) appears at 2009 U.S. Dist. LEXIS 54810 (S.D. Ga. 2004).

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition seeks review of the District Court's determination that Arch Insurance did not act in bad faith. There are no specific Constitutional or statutory provisions challenged, although a section of the Georgia Code, O.C.G.A. § 10-7-22, is cited in argument.

STATEMENT OF THE CASE

1. Respondent issued payment and performance bonds listing Douglas Asphalt Company ("DAC") as principal for multiple paving projects within the state of Georgia (the "Projects"). Petitioner Joel Spivey was an owner and president of DAC who signed a General Indemnity Agreement in favor of Respondent related to the bonds for the Projects. Petitioner Kyle Spivey is the son of Joel Spivey and also signed the General Indemnity Agreement related to these bonds.

Beginning at least in 2002, The Georgia Department of Transportation ("GDOT") engaged in a concerted effort to discredit and destroy DAC. GDOT set about to accomplish this goal by rejecting work performed by DAC and deeming DAC to be in default on several multi-million dollar projects. GDOT based its conduct primarily upon unscientific, unauthorized, and unreliable "tests" that purportedly showed that DAC had used insufficient hydrated lime in the asphalt mixture used on the projects. These actions by GDOT spawned a number of lawsuits in several different venues, including the Superior Court of Fulton County, the Superior Court of Turner County, and the Brunswick Division of the Southern District of Georgia. Both the Superior Courts of Turner County and Fulton County have ruled such tests inadmissible in Georgia, with the Turner County criticizing GDOT for relying upon "junk science".

In 2006, GDOT ultimately defaulted and terminated DAC on the Bacon/Ware, Wayne/Appling and Appling paving projects, or more commonly

referred to as the "Southern Triangle" projects, when they were substantially complete. After receiving GDOT's notices of DAC's default on these three projects, Respondent required that DAC declare itself in default of all Arch-bonded projects in the state of Georgia. Once it defaulted DAC, Arch began making payments to material suppliers and subcontractors that were owed money and also hired and paid general contractors to complete all of the projects to GDOT's satisfaction. Respondent then claimed that it spent in excess of $156,000,000.00 pursuant to their obligations under both the payment and performance bonds issued for the projects.

2. Arch filed the present action against DAC and against Joel and Kyle Spivey, the owners and operators or DAC, to recover the losses it allegedly sustained when it took over and completed the Southern Triangle projects. Petitioners do not dispute Arch's contention that it spent over $156,000,000.00 to finish the projects or that, after applying funds that were recovered by Arch, the net loss to Arch was $88,892,128.15. However, Petitioners do contend that such an amount was excessive in light of DAC's ability to complete the projects for significantly less. Petitioners also contend that Respondent acted in bad faith in failing to contest DAC's liability, given GDOT's reliance on fraudulent tests to declare default, and in failing to allow DAC to participate in the completion of the projects.

3. A bench trial was conducted on February 23-26, 2009 before the Honorable Lisa G. Wood. On June 29, 2008, the District Court ruled in favor of Arch.

Final judgment against Petitioners was entered on July 2, 2009. Petitioners appealed, but the Eleventh Circuit affirmed the District Court opinion in an Order entered February 17, 2010.

REASONS FOR GRANTING THE WRIT

Arch breached its duty to act in good faith when executing the bond agreements on the DAC default.

Under Georgia law, agreements of indemnity, such as the General Indemnity Agreement between Arch and DAC, are generally valid and enforceable. *See Anderson v. United States Fidelity and Guaranty Co.*, 267 Ga. App. 624 (2004); *Nguyen v. Lumberman's Mutual Casualty Co.*, 261 Ga. App. 553 (2003); and *Rhodes v. Amwest Ins. Co.*, 207 Ga. App. 441 (2003). However, an indemnitor can avoid an obligation to reimburse a surety for losses sustained pursuant to a performance bond claim if the surety acted in bad faith. *See McLendon v. Hartford Acci. & Indem. Co.*, 119 Ga. App. 459, 461 (1969) ("Being its agent it is elementary that Hartford held a fiduciary relationship with McLendon and was required to act in good faith and with loyalty."); *see also Reliance Ins. Company v. Romine*, 707 F. Supp. 550 (S.D. Ga. 1989) (holding that indemnification provisions related to bond may be nullity if surety acted in bad faith or abused its discretion). Where a decision is left to the discretion of a designated entity, such as where a surety has the right to settle claims pursuant to an indemnity agreement, the question of whether that entity acted

in bad faith does not turn on whether it acted in error; rather, the question is whether it was arbitrary or capricious. 707 F.Supp. at 552. Case law from Georgia acknowledges that "arbitrary" and "capricious" conduct is similar to "tyrannical" and "despotic" behavior. *See Sawyer v. Reheis*, 213 Ga. App. 727, 730 (1994). In the present case, Petitioners presented sufficient evidence showing that Arch acted in bad faith or otherwise abused its discretion, in at least three ways:

A. Completing the projects at a cost well in excess of an amount which Petitioners could have performed the work;

B. Failing to contest DAC's default and/or dispute their performance bond obligations;

C. Refusing to keep DAC involved in the projects after default to minimize costs.

Each of these provides evidence of bad faith strong enough that the District Court's judgment should be overturned.

A. The Excessive Total Completion Costs Claimed by DAC Were Sufficient Evidence of Bad Faith

At trial, DAC submitted evidence that it could have completed the Southern Triangle projects as well as other Arch-bonded projects for significantly less than Arch expended to finish the incomplete projects. Specifically, J. Carroll Purvis was retained by DAC to perform an "intensive analysis" of the cost differential between Arch completing the Southern Triangle

projects versus DAC. Mr. Purvis testified that "the estimated loss versus the bonding company completing the jobs was approximately six times the amount of loss that was projected if Douglas finished the jobs". The basis of DAC's ability to complete the projects for significantly less than Arch was, in large part, due to DAC's long-standing relationships with the sub-contractors on the projects and the commitments of those sub-contractors to complete the jobs at the cost quoted to DAC.

Another important reason that DAC could complete the jobs for significantly less was that DAC was "already there". In other words, DAC already had the contracts in place for materials, had local asphalt plants which were being used for the projects and had people in place to perform the labor. To this end, DAC's ability to complete the projects for a fraction of Arch's cost was communicated to Arch. Despite this fact, Arch elected to proceed with removing DAC from the projects and to obtain alternative contractors to complete the jobs. Because Arch voluntarily chose to finish these projects without any input from DAC and for such a considerable sum indicates that at the least, Arch abused its discretion.

B. Arch's Failure to Contest DAC's Default and/or Dispute Their Performance Bond Obligations Constituted Bad Faith

Under Georgia law, "[a]ny act of the creditor [i.e. GDOT], either before or after judgment against the principal, which injures the surety or increases his risk or exposes him to greater liability shall discharge

him . . ." O.C.G.A. § 10-7-22. As set forth below, based upon GDOT's general conduct towards DAC and its direct involvement in causing DAC's default on the projects, Arch could have legally refused to honor GDOT's request that it take over the projects. Instead, Arch chose to side with GDOT and complete the projects at Petitioners' expense.

At the trial of this case, Arch conceded that its obligation to complete the bonded projects would not have been triggered unless a default had occurred. And, if Arch had been asked by GDOT to complete any of the projects prior to default, it would have had no obligation to do so. Critically, Arch also conceded that there was no mechanism by which GDOT could default Arch on projects which it only had punchlist items remaining. In light of this recognition, it is undisputed that once GDOT declared DAC on other projects which were not in the punchlist phase, Arch also defaulted DAC on punchlist projects.

Arch elected to declared DAC in default on all of the Arch-bonded projects despite the evidence demonstrating that GDOT was partially responsible for the damages caused by DAC's default on several of the projects. For example, the evidence showed that GDOT had accepted as much as one-third (1/3) of the responsibility for the delay in defaulting DAC on the main GDOT projects. This delay caused Arch's losses to compound. Rather than push the GDOT's liability for Arch's losses which would ultimately become DAC's responsibility, Arch chose to ignore this defense, to the detriment of DAC.

Arch's failure to fully investigate and contest DAC's default and its unwillingness to assert valid defenses to GDOT's request to complete the projects was evidently the result of its desire to satisfy GDOT and ensure its ability to continue to write bonds on future GDOT projects. In essence, Arch chose to protect its own future business prospects at the expense of DAC. This fact alone constitutes bad faith sufficient to absolve DAC of all liability under the General Indemnity Agreement.

C. Not Allowing Petitioners to Participate in Completing the Project Evidenced Bad Faith and/or an Abuse of Discretion

At the trial of this case, the undisputed evidence established that DAC was not allowed to remain involved with the projects after default. Had they been allowed to participate in the completion of the project, Petitioners would have been able to have many of the subcontractors and material suppliers continue to provide materials and services at their original contract prices. Jerry Van Dykes and David W. Littlefield, Jr., two of the subcontractors on the projects, testified that they would have done their best to keep their costs down had DAC remained involved in the projects. Despite this fact, DAC was not allowed to complete the projects.

Such a decision is particularly relevant in light of the fact that these two contractors were ultimately hired by Arch to complete the very same projects they had been working on when DAC was running the projects. These two contractors had long-term

relationships with DAC. Such conduct evidences self-interest sufficient to amount to bad faith on the part of Arch which should have discharged Petitioners from their obligations under the General Indemnity Agreement related to the performance bond claims.

As mentioned above, DAC presented evidence to Arch that it could have completed the same projects it had been terminated from for a fraction of Arch's cost. DAC's ability to complete the projects for considerably less was due to their close proximity to the jobs, their relationships with suppliers and having their own asphalt plants near the projects. Despite making all of this known to Arch, and Arch's ability to simply fund DAC's completion of the projects for one-sixth (1/6) of the cost, Arch elected to proceed without DAC. DAC should not be held responsible for Arch's arbitrary and capricious decision, but rather should be discharged from liability.

CONCLUSION

For all of the foregoing reasons, Petitioner Douglas Asphalt Company respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

ARCH INSURANCE COMPANY,
Plaintiff,

vs.

Case No. CV507-038

DOUGLAS ASPHALT, et. al.,

Defendants.

ORDER

The Judgment of this Court in the above entitled action having been affirmed by the U. S. Court of Appeals;

IT IS HEREBY ORDERED that the Judgment of the Eleventh Circuit, U. S. Court of Appeals, is made the judgment of this court.

This 19th day of February, 2010.

/s/ Honorable Lisa G. Wood
United States District Court Judge
Southern District of Georgia

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-13528
Non-Argument Calendar

D. C. Docket No. 07-00038-CV-5

ARCH INSURANCE COMPANY,

Plaintiff- Counter-
Defendant - Appellee

versus

DOUGLAS ASPHALT COMPANY,
JOEL SPIVEY,
KYLE SPIVEY,

Defendants-Counter-
Claimants-Appellants.

Appeal from the United States District Court
for the Southern District of Georgia

(January 15, 2010)

Before DUBINA, Chief Judge, CARNES and ANDERSON, Circuit Judges

PER CURIAM:

The Georgia Department of Transportation ("GDOT") contracted with Douglas Asphalt Company ("Douglas") to perform work on interstate construction projects. Arch Insurance Company ("Arch") executed performance and payment bonds in connection with Douglas's work on the projects, and Douglas, along with Joel Spivey and Kyle Spivey ("the Spiveys"), executed an indemnification agreement in favor of Arch for all losses sustained as a result of having issued bonds on behalf of Douglas. In August 2006, GDOT determined that Douglas was in default on three projects known collectively as the "Southern Triangle" projects, all of which were bonded by Arch, and Arch became responsible for remedying Douglas's default. After the GDOT determined that Douglas was in default on a number of other Arch-bonded projects, on February 2, 2007, Arch exercised its right under the indemnification agreement and ordered Douglas to cease work on all Arch-bonded projects.

Arch filed suit against the Appellants, Douglas and the Spiveys, to recover its losses. Following a four-day bench trial, the district court entered a judgment in favor of Arch in the amount of $88,892,128.15 plus post-judgment interest. The district court also ordered Douglas to comply with the collateral deposit clause of the indemnification agreement and immediately deposit another $40,000,000.00 in collateral.

The Appellants appeal the Bench Trial Ruling

and the judgment entered in favor of the Appellee, Arch, by the district court. The Appellants contend that the district court erred by failing to find that they were relieved from their duty to indemnify Arch based on Arch acting in bad faith in paying claims under the performance and payment bonds it issued on behalf of Douglas. We affirm.

This court reviews the district court's conclusions of law *de novo*. *Fischer v. S/Y Neraida*, 508 F.3d 586, 592 (11th Cir. 2007). The district court's findings of fact, including determinations of the credibility of witnesses and weight of the evidence, are reviewed for clear error. *Id.*

The parties agree that the indemnification agreement is enforceable absent the Appellants demonstrating that Arch exhibited bad faith in paying the claims under the performance and payments bonds. *See Nguyen v. Lumbermen Mut. Case. Co.*, 261 Ga. App. 553, 555 (2003). Under Georgia law, a finding of bad judgment or negligence is generally not enough to show bad faith. *Id.* Bad faith "imports a dishonest purpose or some moral obliquity, and [it] implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill will." *Id.* (alteration in original). The Appellants assert three examples of Arch acting in bad faith: First, Arch completed the bonded projects at a cost well above the amount which the Appellants claim that they could have performed the work. Second, Arch failed to contest Douglas's default and bond obligations. Finally, Arch did not allow Douglas to remain involved in the

projects following its default.

Arch's completion of the projects at a higher cost does not demonstrate bad faith. The district court factually found that Douglas was invited to all meetings between Arch and construction company being considered to complete projects, but that Douglas failed to send representatives to the meetings. Arch also hired a consulting firm to assist in evaluating and soliciting competitive bids on the projects and only considered other construction companies after determining that Douglas would not be able to complete the projects. The district court specifically found the testimony regarding Arch's good faith efforts in seeking competitive bids credible. Further, the Appellants have not presented any evidence to show that the costs were unreasonable, except to claim that they could have done it for less.

Second, the Appellants have not demonstrated that Arch acted in bad faith by failing to contest the defaults. Under the indemnification agreement, Arch had full discretion in determining whether to defend, settle or pay claims against its bonds. The agreement also provided that if the Appellants wanted Arch to defend a claim, they were required to deposit collateral to pay any judgment rendered in the course of contesting the default plus interests, costs and attorneys fees. The Appellants have not pointed to any default they properly requested Arch to defend that was not defended by Arch.

Arch's failure to allow Douglas to remain

involved in the projects is likewise not evidence of bad faith. The district court made the factual finding that Douglas was involved in the projects through January 2007, and was only excluded following a series of events indicating that Douglas was not financially equipped to complete the projects. Those events included Douglas's default on seven additional GDOT projects bonded by Arch, Douglas's announcement that it was having trouble funding its payroll, and Douglas's failure to post any collateral with Arch, despite its contractual obligation to post $40,000,000.00 in collateral to match the amount of reserve established by Arch. Arch also hired a consulting company to investigate the financial condition of Douglas, and Douglas failed to respond to requests to provide plans to demonstrate that it was capable of completing the projects. Thus, the district court did not err in concluding that Arch's decision to exclude Douglas was not made in bad faith. Accordingly, we find no error and affirm the district court's judgment.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

ARCH INSURANCE COMPANY,

Plaintiff,

vs.

Case No. CV507-038

DOUGLAS ASPHALT,
JOEL SPIVEY and KYLE SPIVEY

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Defendants Douglas Asphalt Company, Joel Spivey and Kyle Spivey, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the judgment of this Court entered on July 2, 2009, entered in favor of the Plaintiff Arch Insurance Company in the amount of Eighty Eight Million Eight Hundred Ninety-Two Thousand One Hundred Twenty-Eight Dollars and Fifteen Cents ($88,892,128.15), plus post judgment interest, attorneys' fees, costs and expenses, and further ordering the specific performance of the collateral deposit clause of the indemnity agreement and immediate deposit of Forty Million Dollars and Zero Cents ($40,000,000.00) in collateral.

This 10th day of July, 2009.

/s/ Ashleigh R. Madison
Ashleigh R. Madison
Georgia Bar No: 346027
Jeremy S. Mackenzie
Georgia Bar No: 436655

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Savannah, GA 31401
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the NOTICE OF APPEAL by serving on all counsel of record by causing same to be placed in the United States Mail in a properly addressed envelope with adequate postage thereon to:

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This 10th day of July, 2009.

/s/ Ashleigh R. Madison
Ashleigh R. Madison
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

ARCH INSURANCE COMPANY,

Plaintiff,

vs.

Case No. CV507-038

DOUGLAS ASPHALT,
JOEL SPIVEY and KYLE SPIVEY

Defendants.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED and ADJUDGED that in accordance with the Findings of Fact and Conclusions of Law of the Court entered June 29, 2009, judgment is hereby entered in favor of the Plaintiff, ARCH INSURANCE COMPANY, and against the Defendants, DOUGLAS ASPHALT COMPANY, JOEL

SPIVEY, and KYLE SPIVEY, jointly and severally, in the amount of EIGHTY-EIGHT MILLION EIGHT HUNDRED NINETY-TWO THOUSAND ONE HUNDRED TWENTY-EIGHT DOLLARS AND FIFTEEN CENTS ($88,892,128.15), plus post-judgment interest, attorneys' fees, costs and expenses, such costs to be taxed by the Clerk.

IT IS ALSO ORDERED AND ADJUDGED that the Plaintiff, ARCH INSURANCE COMPANY, is entitled to specific performance of the collateral deposit clause of the indemnity agreement and the immediate deposit of FORTY MILLION DOLLARS AND ZERO CENTS ($40,000,000.00) in collateral.

APPROVED:

/s/ The Honorable Lisa Goddey Wood
LISA GODBEY WOOD
UNITED STATES DISTRICT COURT JUDGE

Date: July 2, 2009

Scott Poff, Clerk

/s/ Sherry Taylor
By: Sherry Taylor,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

ARCH INSURANCE COMPANY,
Plaintiff,

vs.

Case No. CV507-038

DOUGLAS ASPHALT, et. al.,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-captioned case arises out of a General Agreement of Indemnity (hereinafter "indemnity agreement") entered into between Plaintiff Arch Insurance Company (hereinafter "Arch") and Defendants Douglas Asphalt Company (hereinafter "Douglas"), Joel Spivey and Kyle Spivey (collectively "Indemnitors") . Arch claims that it is owed $88,892,128.15 by Indemnitors for losses incurred as a result of having issued bonds on behalf of Douglas and that it is entitled to specific performance of the collateral deposit clause of the indemnity agreement and the immediate deposit of an additional $40,000,000.00 in collateral. Defendants, on the other hand, assert that Arch performed its underlying bond obligations in bad faith, thereby relieving Defendants of their obligations under the indemnity agreement.

The Court conducted a bench trial on Arch's claims for indemnification on February 23 through 26, 2009. Prior to trial, the parties entered into a number of stipulations of fact that were admitted as evidence in the trial. Doc. No. 53. Attachment "A". After hearing witness testimony and considering the evidence tendered, including these stipulations, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On or about June 30, 2003, Indemnitors executed the indemnity agreement in favor of Arch. Stipulation 1. The indemnity agreement is valid and enforceable.
Stipulation 2.

2. Pursuant to Paragraph 1 of the indemnity agreement, Indemnitors agreed to:

> . . . [I]ndemnify and hold harmless Surety for anyand all Loss sustained or incurred by reason of having executed any and all Bonds. The Indemnitors obligation to indemnify the Surety shall also apply to all Bond renewals, continuations or substitutes therefore. In the event of payments by Surety, Indemnitors agree to accept the voucher or other evidence of such payments as prima facie evidence of the fact and

> extent of the liability of Indemnitors to Surety in any demand, claim or suit by Surety against Indemnitors . . . .

Stipulation 39.

3. Pursuant to the indemnity agreement, in the event of a default on any single project, Indemnitors assigned to Arch all of their rights under all bonded contracts, including their right to any contract balances that were due or to become due under all of the bonded contracts at or after the time of default and all machinery, equipment, tools and materials which were on the site for use on the bonded contracts. Indemnity Agreement, ¶ 7. Plaintiff's Exhibit 1. "Default" is defined in the indemnity agreement as "[a]n instance or condition in which Principal or Indemnitors, or any of them . . . be declared in default on any Bonded Contract" or "neglect or refuse to pay for any labor or materials used in the prosecution of a Bonded Contract." *Id.* ¶ "Default".

4. Also pursuant to the indemnity agreement, in the event of a default, Arch had "the right, but not the obligation, to take possession of the work under any and all Bonded Contracts, and complete or consent to the completion of such Bonded Contracts at the expense of the Indemnitors." *Id.* ¶ 6.

5. The indemnity agreement also provides:

> Surety shall have the exclusive right to decide and determine whether any claim,

> liability, suit or judgment made or brought against Surety on any Bond shall or shall not be paid, compromised, resisted, defended, tried or appealed, and Surety's decision thereon shall be final and binding upon the Indemnitors. Subject to the Surety's rights set forth in the first sentence of this section, which shall remain in full force and effect, if Principal or Indemnitors desire that the Surety litigate such claim or demand, or defend such suit, or appeal from such judgment, they shall deposit with the Surety, at the time of such request, cash or collateral satisfactory to the Surety in kind and amount to be used in paying any judgment or judgments rendered, or which might be rendered, against the Surety, together with interest, costs and attorneys fees.

Id. ¶ 5.

6. Finally, pursuant to the indemnity agreement, Indemnitors agreed that "[i]f Surety shall set up a reserve to cover any actual or potential Loss, the Indemnitors will, immediately upon demand by Surety, deposit with Surety, a sum of money equal to such reserve to be used, at the option of the Surety, to pay the Loss or to be held as collateral security for the Indemnitors' obligations hereunder." *Id.* ¶ 4.

7. Between 2003 and 2006, at the request of Douglas, Arch issued performance and payment bonds on 200 construction projects, many of which were for

projects for the Georgia Department of Transportation (hereinafter "GDOT"). Stipulation 3.

8. On August 1, 2006, GDOT declared Douglas in default on the Bacon-Ware Counties Project, BR-0001-00(219) 01 & EDS-545(33) 01, the Appling-Wayne Counties Project, GIP- 341(39) 01 & BRN-008-11(65) 01, and the Appling County Project, GIP-341(40) 01, referred to collectively as the "Southern Triangle" projects. Stipulations 4,5 & 6. All of these projects were bonded by Arch. Stipulation 3; Testimony of Gail Latham.

9. After these defaults were declared, in October and November 2006, Carl Castellano, Arch's Vice President, traveled to Georgia to meet with Joel Spivey. Stipulation 8; Testimony of Carl Castellano. The purpose of these meetings was to discuss Douglas' financial status and the possibility of Arch financing Douglas' completion of the Arch-bonded projects. *Id.* Joel Spivey traveled to Philadelphia in December 2006 to meet with Arch representatives concerning the same topics. *Id.*

10. Subsequent to these meetings, Arch and Indemnitors entered into an agreement under which Douglas assigned to Arch any and all bonded contract funds. Exhibit "D" to Plaintiff's Exhibit 3; Testimony of Liz Spiker; Latham Testimony. The agreement also called for the establishment of a joint bank account, into which the bonded contract funds would be deposited. *Id.* The joint account was opened with The Bank of Tampa on October 27, 2006. Plaintiff's Exhibit

201; Spiker Testimony; Latham Testimony.

11. Between November 2006 and February 2007, as Arch received funds from GDOT for the defaulted Bacon-Ware, Appling, and Appling-Wayne projects, it deposited these funds into the Bank of Tampa joint account. Spiker Testimony; Latham Testimony. Douglas was notified of all the funds received and deposited by Arch. Spiker Testimony. Between November 2006 and January 2007, the only funds that were deposited into the joint account were all of the funds that Arch received from the defaulted Bacon- Ware, Appling, and Appling-Wayne projects. *Id.* However, beginning in January 2007, funds from other Arch-bonded projects were deposited into the joint account as well. *Id.*

12. After the joint account was established, Douglas advised Arch of the subcontractors and suppliers that needed to be paid out of the joint account funds, and would provide documentation to support those payments. Spiker Testimony; Latham Testimony. Checks were then prepared with one signature on behalf of Arch, and sent to Douglas to obtain the second required signature. Spiker Testimony. Kyle Spivey signed most of the checks that were issued out of the joint account between November 2006 and February 1, 2007. *Id.*; Plaintiff's Exhibit 6. All of the checks sent to the Bank of Tampa for payment to third parties contained two signatures. Spiker Testimony.

13. During this time, Douglas also requested

that Arch make payments to Martin Marietta, Douglas' aggregate supplier, in order to ensure the continued delivery and supply of aggregate for use in paving the various Arch-bonded projects. Spiker Testimony; Latham Testimony. Between November 2006 and February 2007, Arch wired $3,590,788.05 to Martin Marietta to pay for past due invoices for aggregate that had been supplied to Douglas. Plaintiff's Exhibit 8.

14. Also during this time, Arch requested that Douglas sign Letters of Direction and Voluntary Letters of Default for all Arch-bonded projects. Spiker Testimony; Latham Testimony. Douglas did so at Arch's request. Spiker Testimony.

15. Douglas continued to work on all Arch-bonded projects through February 2, 2007, and continued to receive the contract funds for all Arch-bonded projects, other than those funds received by Arch on the defaulted Bacon-Ware, Appling, and Appling-Wayne projects through January 2007, which were deposited into the joint account. Latham Testimony; Spiker Testimony. During this time, however, liquidated damages were being assessed against Douglas, not only on the Bacon-Ware, Appling, and Appling-Wayne projects, but on a number of Arch-bonded projects due to Douglas' failure to timely complete those projects. Plaintiffs' Exhibits 191, 192, and 194; Latham Testimony; Testimony of Dan Rosis.

16. Around this time, Arch engaged the services of Forcon International (hereinafter "Forcon") , a

construction consulting company, to assist Arch in its investigation of both the financial condition of Douglas, as well as the status of construction on all Arch-bonded projects. Spiker Testimony; Latham Testimony; Rosis Testimony; Testimony of Mike Sugar. Forcon consultants visited the Bacon-Ware, Appling, and Appling-Wayne job sites, spoke with representatives of the projects' owners, reviewed Douglas' job records and assessed the status of completion, the amount of work being performed by Douglas, the amount paid to date and the estimated amount of work remaining to be completed. Sugar Testimony; Rosis Testimony.

17. During Arch's investigation, it requested plans from Douglas to show that Douglas could complete the Bacon-Ware, Appling, and Appling-Wayne projects, as well as personal financial information from Joel and Kyle Spivey. Latham Testimony; Castellano Testimony. Despite these requests, Indemnitors did not produce any information to show that Douglas was capable of completing the Bacon- Ware, Appling and Appling-Wayne projects, and failed to show Arch how Arch was to be collateralized if it agreed to provide assistance to Douglas for that completion. *Id.*

18. In January 2007, GDOT declared Douglas in default on another seven projects: Burke County Project EDS-565(8)01, Burke County Project EDS-565(12)01, Turner County Project CSNHS-0006-00(016)01, Jenkins County Project EDS-555(4)01, Brantley County Project CSSTP-M003-00(142)01,

Liberty County Project CSSTP-M003-00(318) & (319)01, and the Bulloch County Project STP-068-1(36)LP. Stipulations 10, 11, 12, 13, 15, 16, 17. All of these projects were bonded by Arch. Stipulation 3.

19. Beginning in January 2007, Douglas informed Arch that it was having problems funding its payroll needs. Spiker Testimony. In response, between January 11, 2007 and February 15, 2007, Arch wired $1,237,124.25 directly to Douglas to pay 75% of its payroll for those weeks as Arch had determined that approximately 75% of the work that Douglas was doing was on Arch-bonded projects. *Id.*; Stipulation 14.

20. In light of Douglas' defaults and its inability to pay its bills when they became due, Arch established a reserve of $40,000,000.00. Latham Testimony; Plaintiff's Exhibit 315; Stipulation 41. On January 4, 2007, pursuant to Paragraph 4 of the indemnity agreement, Arch demanded that Indemnitors deposit with it collateral equal to $40,000,000.00 to cover any anticipated loss. Stipulation 41; Plaintiff's Exhibit 315. Despite this request, Indemnitors never posted any collateral with Arch. Stipulation 41.

21. Also in January 2007, Arch contacted Anderson Columbia, a large construction company in north Florida, and inquired as to whether Anderson Columbia would be able to complete the Bacon-Ware, Appling and Appling Wayne projects. Latham Testimony; Rosis Testimony; Castellano Testimony. Arch also contacted another construction company, RB

Baker, to see whether it was able to complete the Burke (8), Burke (12) and Jenkins projects. *Id.* Both Anderson Columbia and RB Baker were Arch accounts, and Arch believed that they would give Arch favorable proposals with reasonable prices for the completion of the projects. Latham Testimony. Ultimately, after GDOT declared Douglas in default on the Turner County project, Anderson Columbia was asked to consider providing a proposal to complete that project, as well. Rosis Testimony; Castellano Testimony.

22. Joel Spivey was advised of the meetings that Arch representatives scheduled with Anderson Columbia and RB Baker and was invited to attend. Plaintiff's Exhibits 301 & 308; Castellano Testimony. Despite this invitation, nobody from Douglas attended the meetings between Arch and Anderson Columbia and RB Baker Castellano Testimony.

23. Between November 1, 2006 and February 4, 2007, Arch paid $12,756,982.00 to Douglas' subcontractors and suppliers, including overhead expenses and payroll, some of which were not directly connected to Arch-bonded projects. Exhibit 30; Spiker Testimony. Arch only recovered $4,707,047.00 in contract balances. *Id.* Arch made payments that enabled Douglas to continue to work on all of its projects, both Arch-bonded and non-Arch-bonded, while it investigated whether or not Douglas was capable of completing the Arch-bonded projects. Latham Testimony.

24. At the conclusion of its investigation into Douglas' financial condition and the status of the Arch-bonded projects, Arch determined that it would not be feasible to use Douglas to complete the projects. Latham Testimony; Castellano Testimony. On February 1, 2007, Arch sent a letter to Douglas advising it to cease work on all Arch-bonded projects as of February 2, 2007. Latham Testimony; Stipulation 18; Exhibit 358.

25. After Douglas ceased work on the Arch-bonded projects at Arch's direction, Arch took control of the projects, instituted erosion and traffic control maintenance for the projects, notified GDOT and the other owners that it was taking over all Arch-bonded projects, and began the process of assessing the most cost-efficient way in which to resolve or complete the projects. Latham Testimony.

26. After determining that the proposals submitted by Anderson Columbia for the Bacon-Ware, Appling, Applying-Wayne and Turner projects were too high, Arch directed Forcon to solicit competitive bids for the completion of those projects. Latham Testimony; Rosis Testimony; Castellano Testimony. Although the proposals received from RB Baker for the Burke (8), Burke (12), and Jenkins projects were reasonable, RB Baker was not willing to enter into contracts to complete the underlying GDOT contracts for those projects and thereafter withdrew its bids. *Id.* Arch therefore directed Forcon to solicit competitive bids for those projects as well. *Id.*

27. Between February 1, 2007 and April 20, 2007, Douglas was defaulted on another eighteen Arch-bonded projects and demands were made upon Arch by the project owners to complete those projects. Stipulations 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38. As Arch-bonded projects were declared in default, Forcon consultants visited the respective job sites, spoke with the owners' representatives, reviewed Douglas' job records and the owners' job records, and assessed the status of completion, the amount paid to date and the estimated amount of work remaining to be completed for each project. Sugar Testimony.

28. Although Arch had received voluntary letters of default from Douglas on all Arch-bonded projects, see Finding 14 *supra*, Arch only sent out seven of those letters to owners on projects that had to be completed and another twenty-nine projects, most of which were projects on which only punchlist work remained to be completed. Exhibit 12; Latham Testimony; Sugar Testimony.

29. Between January 2007 and October 2007, Arch bid and negotiated completion contracts for nineteen of the defaulted Arch-bonded projects, arranged to buy its bonds back on another ten projects, tendered contractors in return for payment and release of the bonds on another three projects, entered into settlement agreements with Owners regarding the completion of three more projects, worked to finalize the outstanding punchlist and paperwork demands of another ninety projects, and asserted demands and

claims against, and negotiated settlements of those claims, with GDOT on seventeen projects. Latham Testimony.

30. By the end of June 2007, Arch had negotiated and received hard bids for the completion of all Arch-bonded projects, even though completion contracts were not formally signed until later. Rosis Testimony; Castellano Testimony.

31. Throughout the trial, representatives from GDOT, Superior Construction, and Nassau County testified that Arch acted timely in completing their projects and that they were satisfied with the timeliness and quality of Arch's response and performance. Testimony of Greg Mayo; Testimony of Pete Kelley; Testimony of David Hallman.

32. The Court specifically finds the testimony of Gail Latham, Carl Castellano, Liz Spiker, Michael Sugar, and Dan Rosis to be particularly credible as it relates to the good faith efforts of Arch in dealing with Defendants.

33. Arch incurred losses under the performance bonds it issued on behalf of Douglas totaling $156,201,174.69. Exhibits 4, 5, & 33-49. Arch collected contract balances from the Owners on the Arch-bonded projects totaling $91,821,208.38. Exhibits 4 & 10. The $91,821,208.38 figure includes negotiated concessions received from GDOT totaling $21,094,239.00. Latham Testimony.

34. Arch also investigated, analyzed, responded to and paid over 200 claims against the payment bonds it issued on behalf of Douglas. Spiker Testimony; Latham Testimony. Arch's payment bond losses total $23,275,037.59. Exhibits 6, 7, 8, 9, 11, and 32; Spiker Testimony.

35. Adding together Arch's loss of $156,201,174.69 under the performance bonds, Arch's loss of $23,275,037.59 under the payment bonds, and the $1,237,124.25 that Arch advanced for Douglas' payroll, and subtracting the $91,821,208.38 in recovered contract balances, results in a net loss for Arch of $88,892,128.15. Exhibit 4.

36. Arch's losses continue to accrue as defaulted projects continue to be completed. Rosis Testimony. The cost to complete those projects will exceed the $40,000,000.00 reserve set by Arch. Exhibits 33-49.

CONCLUSIONS OF LAW

1. The parties agree that the indemnity agreement executed by Indemnitors in favor of Arch is valid and enforceable. Stipulation 2. Further, this type of agreement has been consistently upheld as valid and enforceable by Georgia courts. *See, e.g., Anderson v. United States Fidelity & Guaranty Co.*, 267 Ga. App. 624, 627 (2004). The Court concludes that the indemnity agreement is valid and enforceable.

2. Under the indemnity agreement, Indemnitors agreed to indemnify Arch for all losses incurred as a

result of having issued bonds on behalf of Douglas. Indemnity Agreement ¶ 1; Stipulation 39. Under that same provision, in the event of payments by Arch, Indemnitors agreed to accept the voucher or other evidence of such payments as prima facie evidence of both the fact and extent of Indemnitors' liability. *Id.*

3. Pursuant to the indemnity agreement, upon the declaration of a default on any one of the Arch-bonded projects, Indemnitors assigned all sums due on all bonded contracts over to Arch because Arch then had the right to take possession of the defaulted project as well as all other bonded projects and complete them or arrange to complete them. Indemnity Agreement, ¶¶ 6 & 7.

4. Under the indemnity agreement, Arch had the exclusive right to determine which claims against its bonds would be defended, settled or paid and its decisions were binding upon Indemnitors. Indemnity Agreement ¶ 5. Under Georgia law, "[w]here a decision is left to the discretion of a designated entity, the question is not whether it was in fact erroneous, but whether it was in bad faith, arbitrary or capricious so as to amount to an abuse of discretion." *Nguyen v. Lumbersmens Mut. Cas. Co.*, 261 Ga. App. 553, 555 (2003).

5. Accordingly, once Arch established its prima facie case, the burden then shifted to Indemnitors to prove that Arch exhibited bad faith or an abuse of discretion in paying the claims under the performance and payment bonds it issued on behalf of Douglas. *Id.*;

Reliance Ins. Co. v. Romine, 707 F. Supp. 550, 552 (S.D. Ga. 1989).

6. When determining whether Indemnitors are liable to Arch under the indemnity agreement, the Court need only determine whether Arch acted in bad faith or abused its discretion. A finding of mere bad judgment or negligence is not enough. *Id.* Instead, bad faith "imports a dishonest purpose or some moral obliquity, and [it] implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill will." *Nguyen*, 261 Ga. App. at 555 (quoting *Blaney v. O'Heron*, 256 Ga. App. 612, 615 (2002)) . Accordingly, the question before the Court is not whether Arch was negligent in handling claims under its bonds, but whether it acted in bad faith in handling those claims.

7. Indemnitors have produced no credible evidence showing that Arch acted with an ill will or dishonest purpose in dealing with the defaulted projects or in handling performance or payment bond claims in a timely manner. At most, Defendants have brought forth a very few instances of specific actions by Arch which were less than perfect. After personally observing the witnesses, listening to their sworn testimony, and studying thousands of pages of payment records, the Court finds overwhelming evidence of Arch's good faith and no credible evidence of bad faith.

8. Although, in hindsight, Arch may not have acted flawlessly in each of the thousands of day-to-day

decisions and/or payments made, the evidence in no way shows bad faith or an abuse of discretion on the part of Arch. To the contrary, significant, credible evidence was submitted proving that in some actions, Arch did more than what was required, essentially exhibiting "great faith."

9. Absent a showing of bad faith or an abuse of discretion on the part of Arch, the language of the indemnity agreement, which the parties have agreed is valid and enforceable, controls the outcome of this case. *Reliance Ins. Co.*, 707 F. Supp. at 552.

10. As discussed, Arch incurred losses totaling $88,892,128.15 as a result of having issued bonds on behalf of Douglas. Under the indemnity agreement, Indemnitors agreed to indemnify Arch for all losses incurred as a result of having issued bonds on behalf of Douglas. Indemnity Agreement ¶ 1; Stipulation 39. Therefore, Indemnitors are liable to Arch for $88,892,128.15.

11. Also pursuant to the indemnity agreement, Indemnitors were obligated to, upon Arch's demand, post collateral in an amount equal to the amount of reserve set up by Arch. Indemnity Agreement ¶ 4. As discussed, the evidence shows that Arch established a reserve of $40,000,000.00 and that Arch demanded that Indemnitors deposit with it collateral equal to that amount to cover any anticipated loss. Stipulation 41. Despite this request, Indemnitors never posted any collateral with Arch. *Id.* Accordingly, Indemnitors' obligation to post $40,000,000.00 in collateral is still

outstanding.

CONCLUSION

Based on the evidence adduced at trial, Arch is entitled to judgment in its favor and against Defendants, Douglas Asphalt Company, Joel Spivey and Kyle Spivey, jointly and severally, in the amount of $88,892,128.15 plus post-judgment interest. Arch is also entitled to specific performance of the collateral deposit clause in Paragraph 4 of the indemnity agreement and the immediate deposit of $40,000,000.00 in collateral.

SO ORDERED this 29th day of June, 2009.

/s/ The Honorable Lisa G. Wood
Judge, United States District Court
Southern District of Georgia